IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

THURSDAY, THE 27TH SEPTEMBER 2007 / 5TH ASWINA 1929

CRL.A.No. 714 of 2000(C)

SC.40/1997 of 2ND ADDL. SESSIONS COURT, PALAKKAD
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APPELLANTS: ACCUSED NOS. 1 AND 3.
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1. UMMER HAJI, S/O. MOIDUNNI HAJI,
THORAKKATU HOUSE,
EDATHANATTUKARA.

2. MOHAMMED JABIR, S/O. UMMDER HAJI,
THORAKKATTU HOUSE, EDATHANATTUKARA.

BY ADV. SRI.P.VIJAYA BHANU
SMT.P.MAYA

RESPONDENT: COMPLAINANT

STATE OF KERALA, REP.BY
PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.AMJAD ALI.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 16/08/2007, ALONG WITH CRA NO. 95 OF 2001 THE COURT ON 27.09.2007 DELIVERED THE FOLLOWING:

tss

CRA. NO.714/2000

ORDER OPN CRL.MP. NO.5167/2000 IN CRA. NO.714/2000

DISMISSED

27.09.2007 **SD/- K.R.UDAYABHANU , JUDGE**

/TRUE COPY/

P.S. TO JUDGE

tss

K.R. UDAYABHANU, J.

CRL.A.NO. 714 OF 2000

DATED THIS THE 27TH SEPTEMBER 2007

JUDGMENT

The appellants are accused 1 and 3 in S.C.No.40/1997 who stands convicted for the offences under Sections 324 and 326 I.P.C. A1 is sentenced to undergo rigorous imprisonment for two years for the offence punishable under Section 324 I.PC. and rigorous imprisonment for five years and to remit a fine of Rs.25,000/- for the offence under Section 326 I.P.C. and in default to undergo simple imprisonment for six months. A3 is sentenced to undergo rigorous imprisonment for two years for the offence under Section 324 I.P.C. Originally A1 to A4 were charge sheeted for the offence under Sections 324 and 302 read with Section 34 I.P.C. A2 is the wife and A3 and A4 are the sons of the first accused.

2. The prosecution allegation is that on account of a dispute regarding a pathway leading to the mosque the accused had ill-will towards the deceased and others and that on 17-8-1995 at about 3 p.m. the accused attacked the deceased Abbas and

when Pws.2 and 3 came to the spot they were also attacked. The scene of occurrence is the southern varamba of the pond by name Nharakulam situated on the north of Nellikkunnu Parambu which is owned by CW11, Soupy, who is the father of PW3. The allegation is that A1 was armed with a dagger and the rest of the accused with sticks. The deceased Abbas, who was sitting on the southern Varamba of the pond, was attacked by A1 with a dagger and he inflicted a blow on his left rib side and also stabbed him on the back. A3 beat the deceased on the head with a stick. A2 and A4 also showered blows on several parts of the body of Abbas. Abbas fell into the pond. PW4, the wife of Abbas was taking bath in the pond. PW2, the father of Abbas and PW3 rushed to the scene hearing the cries of Abbas. When Pws.2 and 3 reached the spot, A1 stabbed PW2 on both his shoulders and PW3 was stabbed on his stomach . The crime was registered for the offence under Section 324 read with Section 34 I.P.C. vide Ext.P14 F.I.R. by PW13, the A.S.I. On receipt of Ext.P1 intimation from Alsipha Hospital, Perinthalmanna, PW1 the Head Constable recorded the F.I.S. of Abbas on 18-8-1995 at 6.30

p.m. Subsequently on 29-8-1995, PW13 filed Ext.P15 report incorporating Section 307 I.P.C. PW14, the Circle Inspector took over investigation on 30-8-1995. Abbas died at 5.15 a.m. on 30-8-1995 after 14 days of the injuries sustained. Ext.P11 is the death intimation. On receipt of the death intimation, PW14, the Circle Inspector filed Ext.P18 report incorporating Section 302 I.P.C. Ext.P4 is the scene mahazar dated 19-8-1995 prepared by PW13, the A.S.I.; and MO.2 stick was recovered from the scene of occurrence. It is PW14, the Circle Inspector who conducted Ext.P3 inquest. The first accused who got himself admitted into the hospital was discharged on 19-9-1995 and then he was arrested by PW14, the Circle Inspector. On 20-9-1995 on the basis of Ext.P19 confession of the first accused, MO.1 dagger was recovered vide Ext.P20 mahazar by PW14, the Circle Inspector .

3. A2 and A4 were acquitted by the Sessions Judge. The evidence adduced in the matter consisted of the testimony of Pws. 1 to 14 and Exts.P1 to P22, Mos.1 to 5. The defence examined Dws.1 to 3 and got marked Exts.D1 to D12 in support of their contention that in fact the incident took place at

Nellikkunnu Paramba owned by A2, the wife of A1 and that there was a civil dispute with respect to the above property and that the civil court had decreed against A2. But appeal was pending; and that at the time the deceased, PW2, PW3 and others came to the place to pluck arecanut and the 2nd accused, wife of the first accused objected to the same and that she was manhandled by the deceased Abbas and on haring her cries, A1 came to the spot and he was attacked and at the direction of the deceased Abbas, PW3 attempted to stab A1 and A1 caught hold off the dagger and brandished the same. The case is that it is in self defence that he brandished the dagger that he snatched from PW3. The statement of A1 was also recorded and a counter case was registered vide crime No.139/1995 in which the deceased Abbas, Pws.2 and 3 were the accused. Subsequently the first accused filed a private complaint alleging that all accused named by him has not been implicated. The same was taken cognizance of as C.C.No.117/1997. Both the police case and C.C.No.117/97 were committed to the Sessions Court and numbered as S.C.No.64/2000 wherein the accused are CW11, Soupy, the

father of PW3, Pws.2,3 and 5 and Abu Haji and Abdul Rasheed. The offences alleged are under Sections 143, 147,148, 447, 323, 324 read with section 149 I.P.C. The above case was tried simultaneously and separately.

4. Of the prosecution witnesses examined, Pws.2 to 5 are the occurrence witnesses. As already noted above,PW2 is the father of the deceased and PW3 is the son of Soupy (CW11) and PW4 is the wife of the deceased and PW5 is the worker of PW3. Pws.2, 3 and 4 have testified with respect to the incident almost in a uniform manner. Certain contradictions were brought out from the evidence of PW5. The witnesses have identified MO.1 dagger and MO.2 stick. Ext.P2 F.I.S. rendered by the deceased also narrates the incident as per the prosecution version. Ext.P2 is relevant under Section 32(1) of the Evidence Act. It is as per Section 27 recovery based on Ext.P19 confession of the first accused that MO.1 dagger was recovered vide Ext.P20 mahazar. MO.1 was recovered from a place having wild growth mentioned as ponthakkad (jungle). Pw9 is the attestor to the above mahazar. The version of PW14, the Circle Inspector who

effected the recovery and that of PW9 the witness do establish the above recovery in a lawful manner.

5. The evidence of PW10, the Medical officer who has proved Ext.P9 wound certificate with respect to PW2 and Ext.P10 wound certificate with respect to PW3 does establish the fact that both of them have sustained somewhat serious stab injuries. Both of them were also admitted in the hospital along with the deceased and the wound certificates show that they were admitted at 4.15 p,m. PW2 had sustained incised wound 3 x 1 c.m. and 2 x 1 cm. at the upper back on left side and over right shoulder respectively and a contusion on the left shoulder. PW3 has sustained an incised wound 4 x 1 cm. at the epigastrium extending upto the rectus sheath and linear abrasion right thener eminence 4 cm skin deep. The above incised wounds can be caused by stabbing with MO.1 dagger is the testimony of PW10. In view of the fact that both Pws.2 and 3 are the injured witnesses, there is no reason to reject their testimony as to the incident. It is the version of the above witnesses that they were standing in the arecanut garden of CW11, the father of PW3

which is situated at a higher level and then heard the cries of Abbas from Nharakulam and they rushed to the spot and witnessed the incident. In view of the fact that both Pws.2 and 3 have sustained serious injuries, the fact that they reached the spot immediately cannot be rejected. Both of them have testified that the time was at about 3 p.m. Both of them were inpatients in the hospital, PW2 for 12 days and PW3 for one week.

6. PW4, the wife of the deceased has stated that while she was washing and taking bath at Nharakulam, her husband was sitting on the southern varamba of the pond when he was attacked. She has also stated that A3 hit the deceased on the head with a stick and that A1 inflicted the stab injuries. It is the version of Pws.2 to 4 that after sustaining the stab injuries the deceased fell into the pond and PW2, the father and PW4, the wife, was trying to lift his body when PW2 was also stabbed.

7. PW10 has also proved Ext.P8 wound certificate of the deceased wherein the injuries mentioned are :

> 1.Incised wound 4 x 2 cms. left paraspinal area T10 level, extending upto spinal cord contaminated with sand particles.

2. Incised wound 2 x 0.5 cms. over T2 horizontal, in the midline, muscle deep

3. Vertical incised wound muscle deep left frontal area 4 cms long.

4. He was having weakness of the left lower limb

5. X-ray showed fracture laminae T12.

It was PW11 who conducted the postmortem examination and issued Ext.P12 certificate. The injuries and observations contained in Ext.P12 postmortem certificate are as follows:

Post-mortem appearances: Body of a well built adult male. Postmortem staining on the back. Rigour mortis established and retained all over the body. N o sign of decomposition. Following evidences of ante-mortem injuries found on the body.

1.A scar 3 x 0.2 cm.on the middle of inner aspect of left forearm.

2. Abrasion with easily pealable black scab ju above left hip joint.

3. Abrasion with easily pealable black scab 1 x 0.2 cm, 12 cm below the left nipple at 5 O' clock position.

4. A scar 4 x 2 cm.on the right shoulder.

5. A scar with suture marks on either side on the right side of back inner end at T2 level.

6. A scar with suture marks on either side on the left side of back lower end at the T10 level and upper and outer end just below the shoulder blade. Suture was found separated at the outer and for a length of 1 cm.

7. A scar 1 1 x 1cm. 8.5 cm below the outer end of injury No.6

8. A curved scar 12 x 0.5 cm on the inner aspect of left forearm 4 cm above the wrist.

9. Sutured wound 4.5 long 4 cm above the left eyebrow. On removal of the sutures the wound was found to be well haled. On desection, right hemisphere of brain showed a thin film of subdural bleeding (black in colour) and subarchnoid bleeding. Bleeding into thalamus and pons seen; all bleeding are black in colour (contre coup injury) signs of increased intra cranial tension present. No vascular abnormality found in the brain.

All the scares are found to be more than 7 days and below 3 weeks of age. Age of abrasion can be said only over 7 days. Since all the external injuries are healed exact nature of the wound and the type of weapon used cannot be said with certainty. The injuries of brain could be due to a blunt force injury.

Air passages normal. Lungs were congested and oedemeters; heart was normal size. Walls valves chambers normal. Coronaries patent. Stomach was empty. No injury

to the thoracic and abdominal organs could be detected. all the internal organs conjested.

Opinion as to the cause of death: Findings were consistent with death due to head injury.

8. Evidently although the deceased sustained stab injuries, the death was on account of the head injury which has been allegedly sustained by hitting with the stick by A3. PW4, the wife of the deceased has identified MO.2 as the weapon used by A3. It was brought out that apart from the dispute with respect to the pathway there was also civil dispute between A2, the wife of A1 and CW11, Soupy; and there were also police complaints in the matter.

9. The defence had strongly disputed the scene of occurrence mentioned in Ext.P4 scene mahazar. PW12, the Village Assistant who prepared Ext.P13 plan has denied the existence of a pond at the place. The Sessions Judge has rightly discarded his evidence pointing out that he has been won over by the defence after his retirement. The evidence of Pws.2 to 4 and the fact that sand particles were found in the injuries sustained on the rib portion of the deceased and the version of

PW.13, the A.S.I. who prepared Ext.P4 scene mahazar was relied on to discard the defence suggestion that the scene of occurrence is not as mentioned in the prosecution case. The contention that in Exts.P8 and P10 wound certificates also, the exact place, i.e. southern bund of Nharakulam pond was not mentioned and the name of assailants also not mentioned was also rejected considering the fact that the Doctor might have mentioned Nellikkunnu and Edathanattukara as the places as the persons who brought the deceased might have said so as the above are the name of the place where the pond is situated. It was also noted that at the time the wound certificates were recorded when the deceased and Pws.2 and 3 were seriously injured. PW10, the Doctor would not have given much influence to these details in the wound certificate. The deceased and Pws.2 and 3 were attacked with sticks were also not mentioned in the wound certificate. The Sessions Judge has rightly noted that the above aspect also did not assume significance then as it was the stab injuries that were serious. Ext.D3 series of contradictions in the C.D. were denied by PW2. The above contradictions are from the

statement recorded by PW4 at the time of inquest. The witnesses were questioned at the time of inquest as well as by PW13 and PW14. The court found that the contradictions in the statement of inquest cannot be very relevant in view of the fact that the statement of PW2 was recorded at the death bed of his son. The dispute with respect to the presence of Pws.2 and 3 was also rejected as they have sustained injuries in the incident. The contradictions brought out in the evidence of PW4 is also with respect to the statement recorded at the time of inquest. The above statement was also recorded near dead body of her husband and she would not have been in a composed state of mind then. Of course, there is a number of contradictions in the version of PW5 with respect to his Section 161 Cr.P.C. statement. PW5 has denied Ext.D6 series as such. But as noted by the Sessions Judge the same is no ground to reject the prosecution version brought out through the testimony of Pws.2 to 4.

10. The delay in reaching the F.I.R. before the court, i.e. on 19-8-1995 at 10.30 a.m. was also found to be inconsequential and rightly so, as evidently the F.I.S. was recorded at the

hospital and there can be no delay in registering the F.I.R. and immediately on the next day morning at 6.30 a.m. the same has reached before the Magistrate. The contention as to the non-mentioning of the injuries sustained by the accused was also rejected as the injuries sustained which was proved by Pws.1 and 2, the Doctors are of a very minor in nature and the treatment undergone for A1 was for urinary detention, which was not the after effect of the injury sustained in the incident. As per Exts.D7 and D8 wound certificates of A1 and A2 the injuries noted on A1 are:

1. Abrasions right parietal scalp, right knee
2. contusion right upper anterior of biceps
3. No bony injury

The injuries sustained by second accused are extracted hereunder:

1. Abrasion left forearm 2 x 2 cms.
2. No bony injury.

The injuries being of a minor nature, the prosecution cannot be found fault with and the prosecution version doubted on the basis of the above contention. I find that the Sessions Judge has meticulously considered the evidence adduced in the matter. I

find that the finding of the court below as to the guilt of the accused is only to be sustained. The conviction is confirmed.

Counsel for the revision petitioner has pleaded for leniency pointing out that A1 is right now more than 61 years of age and that A3 is leading a family life and that more than 12 years have elapsed since the commencement of the proceedings and so far the petitioners were living under the shadow of impending imprisonment. All the same, I find that the gravity of the offence cannot be belittled. In the circumstances, the sentence imposed on A1 is modified to undergo rigorous imprisonment for six months and to pay a fine of Rs.One lakh and in default to undergo rigorous imprisonment for 10 months. The sentence imposed on A3 is modified to rigorous imprisonment for four months and to pay a fine of Rs.50,000/- and in default to undergo rigorous imprisonment for a period of eight months. The fine amounts, if realised, shall be paid to PW4, the wife of the deceased. The appeal is disposed of accordingly.

ks. **K.R.UDAYABHANU, JUDGE**

K.R.UDAYABHANU, J

CRL.A. NO. 714 OF 2000

JUDGMENT

27-9-2007

ks.